87-686

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1987

HAROLD B. SCHLENGER, Petitioners,

v.

MONICA P. SCHLENGER, A/K/A MONICA PETRICEK, INDIVIDUALLY AND AS TRUSTEE OF THE UNITED WOOL PIECE DYEING AND FINISHING COMPANY PENSION TRUST, UNITED WOOL PIECE DYEING AND FINISHING COMPANY PENSION TRUST, UNITED WOOL PIECE DYEING AND FINISHING COMPANY, CAMPBELL INVESTMENT COMPANY, AND HARMONIQUE FARMS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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135 pp

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the court can enter summary judgment for either party where there are important trialable issues of fact and more particularly where, petitioner, Harold B. Schlenger disputed he was formally and properly discharged as alleged by respondent on April 9, 1978.

2. Whether the court can enter summary judgment based on a document offered to the court by the respondent, which is denied and alleged fraudulent by certification of the petitioner to the court without a trial of the factual issues.

2. Whether the court can enter summary judgment without ruling on motion seeking deposition of respondent for failure to appear; more particularly seeking deposition regarding alleged fraudulent document submitted to the court.

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LISTING OF ALL PARTIES

Listing of all parties to the preceedings in the court whose judgment is sought to be reviewed:

Monica P. Schlenger, A/K/A Monica Petricek, individually and as Trustee of the United Wool Piece Dyeing and Finishing company Pension Trust, United Wool Piece Dyeing and Finishing Company Pension Trust, United Wool Piece Dyeing and Finishing Company, Campbell Investment Company, and Harmonique Farms Corporation.

Petitioner, HAROLD B. SCHLENGER, prays that a WRITE OF CERTIORARI issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered and filed June 29, 1987.

OPINIONS BELOW

The memorandum opinion of the United States court of appeals for the third circuit in case No. 87-5017 affirming summary judgment in favor of respondent (App A).

The opinion of the United States district court for the district of New Jersey civil No. 85-2091; partial summary judgment dated March 24, 1986 (App B) and order of April 15, 1986 (App D); final summary judgment dated May 27, 1986 (App C) and order of June 12, 1986 (App E); and order denying petitioners motion for reconsideration dated December 5, 1986 (App F) and opinion filed December 8, 1986 (App G) & (App F).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit in case No. 87-5017 was filed June 29, 1987 (App H).

Order Extending Time to File Petition for Write of Certiorari by the Supreme Court of the United States No. A-254 dated September 28, 1987 extending time to October 27, 1987 (App H).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1)

CONSTITUTIONAL PROVISION, STATUES, AND REGULATIONS INVOLVED

1. The FIFTH AMENDMENT TO THE

UNITED STATES CONSTITUTION provides in relevant part: No person...be deprived of life, liberty or property without due process of law;...(App I)

2. Federal Rules Civil Procedure Rule 56 (c) 28 U. S. C. A. provides in relevant part:...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...(App J)

STATEMENT OF THE CASE

The Petitioner, Harold B. Schlenger,

commenced this action in the United States District Court for the District of New Jersey on May 1, 1985. This complaint, amended on July 25, 1985 sought to require the United Wool Piece Dyeing and Finishing Co. Pension Trust (the "Plan") to pay him certain Plan benefits due him and in which he was vested. Payment of these benefits had been ordered by the Superior Court of New Jersey as part of a divorce judgment in proceedings between him and his former wife, now known as Monica Petricek.

The Petitioner in his U.S. District Court complaint also sought relief against Ms. Petricek, individually and as a trustee of the Plan and against United Wool Piece Dyeing and Finishing

Co. ("United Wool") for their failure to discharge their duties as trustees of the Plan and for breach of fiduciary duties. Relief was also sought against Campbell Investment Co. and Harmonique Farms Corporation as transferees of Plan Assets which should have been paid to Mr. Schlenger.

Cross motions were filed for summary judgment.

Through certification of adversary's attorney Nancy Lem, Esq. dated February 26, 1986 there was, amongst other documents she stated she received from the U. S. Dept. of Labor, submitted to the court an alleged corporate resolution dated April 9, 1978 stating the petitioner Mr. Schlenger was

discharged from his duties as an officer, director, agent, servant and/or employee of the company United Wool Piece Dyeing and Finishing Co. (App L) & (App N).

The petitioner, Mr. Schlenger in response to attorney Nancy Lem's certification submitted to the court a certification of his own dated March 13, 1986 disputing the alleged resolution of discharge and also by denial alleging the resolution as fraudulent (App O).

On March 24, 1986 the District Court heard argument on the parties' cross motion for summary judgment. The petitioner, Mr. Schlenger, sought partial summary judgment on the issue of liability. The motion was based on the

provision of Section 11.1 (b) of the Plan which provided that benefits of participants in the Plan became fully vested if United Wool failed to make contributions to the Plan for two consecutive years (App K). Respondents sought summary judgment, arguing that Mr. Schlenger's claim was barred by the statue of limitations and by his status as a co-fiduciary of the Plan and that Mr. Schlenger had received all benefits under the Plan to which he was entitled because the petitioner was terminated April 9, 1978 by the alleged corporate resolution (fifteen weeks prior to September 1, 1978 the alleged required vesting date according to respondents). Decisions was rendered March 24, 1978 (App B).

At the argument of the motion, the Court rejected respondent argument based on the statue of limitations and on Mr. Schlenger's alleged status as a co-fiduciary of the Plan.

The Court directed further briefing on the issue of the non- forfeitability of Plan benefits.

On May 27, 1986, following the required briefing, the Court held argument and granted defendant's motion dismissing the complaint (App C).

The decision, formalized by an Order dated June 12, 1986 which was based on legal theories and analysis sua ponte not briefed or raised by either party. The court ruled that Mr. Schlenger's

benefits were not vested under the Plan holding that under the Plan forfeiture was permitted not only of the right to receive pension benefits before normal retirement age, but allowed the employer to terminate the employee's right to receive those benefits after normal retirement age based upon the alleged corporate resolution of discharge dated April 9, 1978 (App L).

By Notice of Motion dated June 23, 1986, the petitioner brought on a motion for (a) reconsideration and reargument and (b) summary judgment. This motion, which sought to demonstrate the apparent misapplication of the law to facts and disputed facts; and also the profound impact that the decision would have on pension law, was denied by order dated

December 5, 1986 (App F).

The petitioner filed his notice of appeal to the United States Court of Appeals for the Third Circuit, on December 30, 1986.

The question of dispute of genuine material fact regarding the alleged termination date of April 9, 1978 by corporate resolution was again clearly brought to focus by the petitioner to the attention of the Court of Appeals (App M).

The District Court of the United States for the District of New Jersey decision was affirmed by the Court of Appeals on opinion filed June 29, 1987 (App A).

REASONS FOR GRANTING THE PETITION

This decision of the United States Court of Appeals Third Circuit is erroneous and in conflict with prior decisions of this Court as well as it's own Court of the Third Circuit and other Circuits of of the United States Court of Appeals. It has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision and overview.

The United States Court of Appeals for the Third Circuit ruled in it's affirmation of the summary judgment of the United States District Court of New Jersey that the petitioner was discharged by the employer United Wool

in 1978. The district court's opinion of March 24, 1986 noted Rule 56 of the Federal Rules Civil Procedure as providing summary judgment guidance, decided that the petitioner was discharged from his position as an officer, director, agent, servant and/or employee of the company by resolution dated April 9, 1978. This alleged resolution was submitted by the respondent, with only the respondent's attorney Nancy Lem's certification, not the certification of the respondents. (App L) & (App N).

Said resolution stated all directors were present at the meeting and voted unanimously to discharge petitioner as an officer, director... and employee of the company.

Upon notice of this certification submitted to the court, the petitioner immediately responded by his own certification denying he was present as stated at the alleged corporate meeting, or that he voted affirmatively for his own discharge as stated in the resolution. Petitioner also stated he was never given notice of the meeting. The resolution was alleged a fraudulent document. (App O)

On review of a summary judgment the court is required to determine whether the record as it stands reveals any disputed issue of material fact, assume the resolution of any such issue in favor of the non movant, and determine whether the movant is then entitled to judgment as a matter of law. First

Jersey National Bank v. Dome Petroleum, Ltd. 723 F2d 335 (3d Cir. 1983).

It has been further characterized that summary judgment is a drastic remedy and that courts are to resolve any doubts as to the existence of genuine issues of fact against the moving parties. Ness v. Marshall, 660 F2d 517 at 519 (3d Cir. 1981) quoting Tomalewski v. State Farm Life Insurance Co. 494 F2d 882, 884 (3d Cir, 1974).

Respondent at no time replied to petitioners certification disputing the alleged corporate resolution of his discharge. In Massey-Ferguson Inc. v. Bent Equipment co. C.A. Fla. 1960, 283 F2d 12, whether fraud has been committed ordinarily requires the determination of

question of fact by jury, or by court if case is tried without a jury. 24Am Jr., Fraud & Deceit, § 291, p 137; 37 C.J.S. Fraud § 123 p448; and § 124, pg. 451.

It is not the purpose of Rule 56 to deny to litigants the right of a trial if they really have issues to try. National Screen Service Corporation v. Poster Exchange Inc. 5 Cir, 305 F2d 647 (1962).

Accordingly the court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried. Wright & Miller, Federal Practice and Procedure: Civil § 2712 p379.

On assuming petitioner was not

properly and formally discharged, his employment would have continued well past the fifteen weeks to the date of September 1, 1978 the date respondent claims was required to participate in the trust plan disbursement. The petitioner was involved in the company for well over twenty-two years in the year 1978.

By reply certification dated August 5, 1986 of petitioners' attorney, Eric Savage Esq., in support of petitioner's motion to the district court for reconsideration and reargument and for summary judgment; it was respectfully submitted to the court that its decision was premised on the erroneous conclusion that the petitioner was discharged from his employment in April, 1978. Once

again bringing to the court's attention the petitioner's certification that he was not legally or properly discharged (App P). Additional documentation of the prior divorce proceedings transcripts were submitted to the court showing petitioners testimony that he was not at the alleged board of directors meeting as alleged; also the court of the petitioner's Motion to Compel Depositions was not ruled or acted upon. The district court denied reconsideration stating its summary judgment stands (App F) & (App G).

Trial by affidavit is no substitution for jury which so long has been the hallmark of "even handed justice". Poller v. Columbia Broadcasting Sys. Inc. 1962, 82 S. Ct.

486. 368 U. S. 464, 7 L. Ed.2d 458. Further states but we cannot say on this record that "it is quite clear what the truth is".

It is even further stated in Sartor v. Arkansas Gas Corp. 321 U.S. 620,627, 64 S. Ct. 724,728, 88 L Ed. 967 (1944) rule (56) is not to cut litigants off from their right of trial ...if they really have issues to try.

On motion of summary judgment opposing party's affidavits must be taken as true with all disputes resolved in his favor. Fitzgerald v. Seaman's, 1977, 553 F2d 220, 180 U.S. App. D. C. 75.

Petitioner in the district court was

seeking to depose the respondent Monica Petricek, who failed to appear for depositions. A motion to compel deposition of the respondent was before the district court which never ruled on same. This discovery was crucial to assist in proving the resolution submitted to the court to be fraudulent, however the petitioner was deprived of this discovery process.

The district court's Judge Ackerman's order granting the respondents' motion for summary judgment pursuant to F. R. Civ. Pr. 56 cites the case Sames v. Gable, 732 F2d 49 (3d Cir 1984) as support thereof. Sames stands for the position that it is an error for the court to grant a motion for summary judgment while the plaintiff's

interrogatories remained unanswered. This same court criticize the practice of granting summary motions at a time when pertinent discovery requests remained unanswered by the moving party.

This holding of Judge Ackerman of Sames at 52 is confusing to the facts presented. Sames at 57 further went to say by acting on motion for summary judgment ...without reference to what might be developed in discovery...the court erred. Costlow v. United States, 552 F2d 560, 564 (3d Cir 1977).

The U. S. Court of Appeals for the Third circuit on review for appeal requested no oral argument. The appeal court in its opinion stated Mr. Schlenger, petitioner was discharged

1978 as alleged and never addressed itself to the disputed facts.

However inferences to be drawn from the underlying contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. Goodman v. Mead Johnson & Co., 534 F.2d 566,573 (3d Cir 1976), cert denied, 429 U.S. 1038, 97 S. Ct. 732, 50 L. Ed.2d 748 (1977). The appellate court on review is required to apply the same test the district court should have utilized initially.

This Court in United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1963) summary judgment may only be granted if, taking

the non movants allegations as true and drawing all inferences in his favor, the court is convinced from its review of the evidential sources available that no genuine issue as to material fact remains for trail, and that the moving party is entitled to judgment as a matter of law. In the matter at hand there were disputed facts of grave concern.

CONCLUSION

There can be no question that the petitioner must be granted relief from this grave misapplication of justice. The main basis of defense offered by respondent was a resolution that alleges the petitioner was discharged at an earlier date of April 9, 1978 and was

not employed at the September 1, 1978 date respondent said was required for petitioner to participate in disbursement of the Plan funds.

The petitioner on several occasions said to the court; no I was not properly or legally discharged as alleged and that this resolution is a fraudulent document.

There is no question petitioner was entitled to a trial of this genuine issue of facts. However, he was cut off by a misapplication of summary judgment, taking from him his constitutional right under the Fifth Amendment of the U. S. Constitution (App I). He was unjustly deprived of his property without due process of law.

Petitioner therefore prays to this Court for relief of this summary judgment, issuance of write of certiorari and seeking summary reversal.

Respectfully submitted,

Harold B. Schlenger

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-5017

HAROLD B. SCHLENGER,

Appellant

v.

MONICA P. SCHLENGER, A/K/A MONICA PETRICEK, INDIVIDUALLY AND AS TRUSTEE OF THE UNITED WOOL PIECE DYEING AND FINISHING COMPANY PENSION TRUST, UNITED WOOL PIECE DYEING AND FINISHING COMPANY PENSION TRUST, UNITED WOOL PIECE DYEING AND FINISHING COMPANY, CAMPBELL INVESTMENT COMPANY, AND HARMONIQUE FARMS CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 85-2091)
District Judge: Honorable
Harold A. Ackerman

Submitted Pursuant to Third
Circuit Rule 12(6)
June 24, 1987

Before: GIBBONS, Chief Judge, WEIS, Circuit Judge, and GILES, * District Judge

Filed June 29, 1987

MEMORANDUM OPINION OF THE COURT

* The Honorable James T. Giles, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

WEIS, Circuit Judge.

Plaintiff was one of the trustees of a pension trust established by the United Wool piece Dyeing and Finishing company until he was discharged from the company in 1978. The trust used contributions from the company to purchase insurance policies on the lives of the participants. When a participant left employment with the company, he received the policy that had been taken out in his name. A provision in the

trust agreement denied any participation in the plan's auxiliary fund to a participant who left the company. This plan was not amended to comply with the requirements of ERISA, which became effective in 1976.

On his discharge from the company in 1978, plaintiff received his life insurance policy, but was denied any part of the "auxiliary fund." The district court concluded that plaintiff did not have a vested right to a share of the auxiliary fund because it was not an "accrued benefit" under ERISA, 29 U.S.C. § 1053(a). See Bencivenga v. Western Pennsylvania Teamsters & Employers Pension Fund, 763 F.2d 574 (3d Cir. 1985).

Because plaintiff was not entitled to benefits under the auxiliary fund

division in the trust agreement, the district court also entered summary judgment for defendant on the claims for breach of fiduciary duty and allegations of gross negligence.

The district court had previously denied the defendant's motion for judgment on the ground that the statute of limitations on the ERISA claim had been barred before plaintiff had filed his suit.

We do not reach the question of the statute of limitations, which has been urged as an alternate ground for affirmance, although we have serious doubts that the limitations period had not expired before plaintiff filed his suit on the ERISA claim.

We conclude that the district court did not err in its determination that

the plan and the action of the trustees in barring the plaintiff's participation in the auxiliary fund did not violate ERISA. Having disposed of the federal claims, the district court properly declined to entertain the plaintiff's claims arising out of his divorce settlement.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

WEIS

Circuit Judge

APPENDIX B

HAROLD B. SCHLENGER,

Plaintiff,

-vs-

MONICA P. SCHLENGER,
et als,

Defendants.

CIVIL 85-2091

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Newark, New Jersey
March 24, 1986

OPINION

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN,
U.S.D.J.

Appearances:

LAMPF, LIFKIND, PRUPIS
& PETIGROW, ESQS.
BY: DAVID AVIGDOR, ESQ.
For the Plaintiff

HANNOCH, WEISMAN, ESQS.
BY: IRVIN M. FREILICH, ESQ.
For the Defendants

THE COURT: This is an action by

Plaintiff Harold B. Schlenger against Defendants Monica P. Petricek, United Wood Piece Dyeing and Finishing Co. Pension Trust, ("Trust"), United Wool Piece Dyeing and Finishing Co., Campbell Investment Co., and Harmonique Forms Corp. under the Employee Retirement Income Security Act of 1974, 88 Statutes at Large 829 (codified as amended at 29 U.S.C. Section 1001 et seq. ("ERISA"). The matter is before me today on the parties' Cross-motions for Summary Judgement. I turn first to defendants' Motion for Summary Judgement.

At the outset I note that Rule 56 of the Federal Rules of Civil Procedure provides that Summary Judgment is not to be granted unless, after all reasonable inferences are drawn in favor of the nonmoving party, there is no genuine

issue of material fact and the moving party is entitled to judgement as a matter of law. See Sames v. Gable, 732 F.2d 49, 50 (3d Cir. 1984).

With that standard in mind I find the facts to be as follows: Harold B. Schlenger and Monica petricek were married in 1956. Mr. Schlenger subsequently became involved as a salesman for the United Wool Piece Dyeing & Finishing Co. (United). The company was founded by Ms. Petricek's former husband and she inherited the business upon his death.

In 1968, Mr. Schlenger and Ms. Petricek were contacted by an agent for the Equitable Life Assurance Society, Walter H. Degenhardt. He suggested to them, as officers of United, a variety of insurance benefits that United may

want to offer to its employees.

On June 1, 1968, the company instituted a pension plan for its officers and employees, the United Wool Piece Dyeing & Finishing co. Pension Trust. The Trust consisted of: 1) Equitable life insurance policies for each individual eligible for the plan, the face amount of the policy was to be equal to one hundred times the normal retirement benefit provided for such participant under the Pension Plan; and 2) an auxiliary fund to be maintained by the trustees of the Trust. The Trust was funded entirely by employer contributions. The trustees of the Trust were Monica Petricek, Harold B. Schlenger and Harry Petricek.

In early or mid-1974, United ceased operating, but the Trust remained

active. Insurance premiums were paid by borrowing on the policies themselves. However, between 1974 and 1977, moneys were withdrawn from the Trust auxiliary account over Mr. Schlenger's objections by checks made payable to or endorsed by United, Campbell Investment and Harmonique Farms. After September 1, 1974 only Plaintiff Petricek and Harry G. Petricek, the trustees, remained as participants in the plan. The other participants left the plan and received the cash value of their insurance policies free of outstanding loans.

On September 1, 1976, the trustees ceased paying premiums on the insurance policies covering the remaining participants. Article XI of the Trust Agreement provides that nonpayment for two successive years of the premiums on

all policies and contracts held by the trustees caused termination of the Trust. Article XI further provides that in the case of such a termination, the interests of the participants in the Trust "shall be fully vested as of the first date of nonpayment of premiums."

Article IX of the Trust also provides that upon termination of employment, an employee's interests in the plan vests. However, upon termination no employee had a vested interest in the auxiliary fund. See Article IX, Section 9.2. Article XI of the plan provides that the assets of the Trust shall be distributed upon termination of the plan.

In 1977, plaintiffs herein brought an action against Petricek for dissolution of the marriage. By

corporate resolution dated April 9, 1978, Plaintiff Schlenger was discharged form his positions as "officer, director, agent, servant and/or employee" of United and was "no longer authorized to perform any act or function of any kind or nature whatsoever on behalf of the corporation." See Exhibit A to Supplemental Certification of Nancy Lem. This resolution did not explicitly address Mr. Schlenger's role of trustee for the Trust. While neither of the parties provide the Court with a copy of the Order, Mr. Schlenger certifies that during 1978 the Superior Court of New Jersey enjoined him from any continued involvement in the business or activities of the defendants.

Plaintiff certifies that this

injunction barred him from acting as a trustee of United's plan. Defendants do not dispute that this injunction was entered.

Defendant surrendered his life insurance policies under the Trust on undetermined dates in 1977 and 1978. See Report of Edward Bojett, United States Department of Labor, dated June 4, 1982. Schlenger received a diminished cash surrender value of $4,700.52 due to the borrowing done on the policies to pay their premiums.

Some time in 1981, the United States Department of Labor began an investigation of the Trust pursuant to a Complain filed by Mr. Schlenger earlier that year. The Complaint alleged lack of information regarding his (Schlenger's) pension benefits.

In the meantime, on August 4, 1981, the matrimonial trial between Schlenger and Petricek concluded. By final judgment of divorce dated September 16, 1981, the marriage was dissolved. The judgment awarded all assets of the marriage to Defendant Petricek with the exception of Schlenger's personal possessions and one share of capital stock each in Campbell Investment Company and United. Moreover, Paragraph 8 of the judgment provided: "8. The Pension fund of the United Wool Piece Dyeing & Finishing Co. which is presently under investigation by new Jersey Department of Labor is to be distributed to the beneficiaries of such pension fund as those interests are determined to exist by said Department of Labor."

The defendants note in their brief that this paragraph was incorrectly drafted to say New Jersey Department of Labor when in fact the Court intended to state the United States Department of Labor which was then investigating the Trust. See plaintiff's moving brief at Page 6.

By letter of August 27, 1982, the Department of Labor informed the trustees of their findings in the investigation of Mr. Schlenger's Complaint. In their letter of January 6, 1983, the Department of Labor concluded that although ERISA viclations had occurred, they declined to take any action against the trustees of the Trust. The department of Labor did warn of possible suits by other parties as provided for in ERISA Section 502(a).

The Department also reserved their right to review the decision.

In 1983, plaintiff renewed his efforts in the State Courts to obtain benefits under the Trust. Plaintiff moved before the Superior Court, Chancery Division, for enforcement of payment of the pension trust funds. The Honorable Florence Peskoe, J.S.C., declined to render a decision on the last such Motion, but instead sought documentation as to the amount to be enforced. By Order dated May 25, 1984, Judge Peskoe modified Paragraph 8 of the final judgment of divorce by substituting for it the following paragraph: "The Pension fund of the United Wool Piece Dyeing & Finishing Company is to be distributed to plaintiff in the amount of his account

thereunder as of the date of distribution and to defendant in the amount of her account thereunder as of the date of distribution. The amount standing to the account of each of plaintiff and defendant is to be determined by a consulting actuary appointed by this Court for purposes of making such computations and reporting thereon to the Court in writing."

Thereafter, Judge Peskoe appointed Richard Furlin as actuary by Order dated october 2, 1984. On January 14, 1985, Judge Peskoe ordered Defendant Petricek to turn over documents requested by the actuary within seven days under penalty of sanctions, a fine and counsel fees. This Order also provided for the issuance of an arrest warrant upon ex parte application on notice. The fines

were never paid and an arrest warrant never issued.

This action was commenced on May 1, 1985. Plaintiff's Amended Complaint, filed July 25, 1985, is in eight counts. Counts 1, 2 and 4 allege that defendants breached their fiduciary duties under ERISA by failure to maintain sufficient assets in the Trust and to pay benefits and through violation of 15 U.S.C. Section 1104(a)(1)(B) and (D). These sections require a fiduciary to discharge his duties under a prudent man standard of care and in accordance with the instruments governing the plan. Count 3 appears to seek enforcement of Paragraph 8 of the final judgment of divorce. Counts 6 and 7 allege State law claims of breach of fiduciary duty and gross

negligence. Count 8 seeks attorneys' fees.

Defendants first argue that plaintiff's claims are barred as a matter of law by the applicable Statutes of limitation. As to the ERISA breach of fiduciary duty claims, the Statute of Limitations is found at 29 U.S.C. Section 1113. Section 1113 states: "a(a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of --

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured

the breach or violation, or (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation."

Defendants contend that Plaintiffs ERISA claims are barred by either the three or the six-year limitations period.

As to the breach of fiduciary duty claims based on violations of Section 1104 and the failure to maintain the

assets of the fund, defendants contend that the cause of action accrued, at the latest, during 1977. As to the breach of fiduciary claim based on failure to pay benefits, defendants argue that the Statue of Limitations commenced running in 1978 when Schlenger received the cash surrender value of his insurance policies.

As to the plaintiff's State law claims, defendants argue that the applicable Statute of Limitations is the six-year period provided for contractual claims in N.J.S.A. 2A:14-1. Although defendants' papers don't expressly state the event that caused the cause of action to accrue, defendants conclude that the Statute of Limitations as to these claims ran in 1984.

In response plaintiff argues that

the basis for his ERISA actions is defendants' failure to pay benefits under the Trust. Plaintiff reasons that this failure to pay is in the nature of an omission and that defendants' obligation to pay the Trust benefit is a continuining one. Plaintiff therefore contends that the six-year Statute of Limitations of Section 1113(a)(1)(B) applies. Since defendants' alleged breach continues today, plaintiff argues that his cause of action has not yet expired.

Alternatively, if the three-year limitation period of Section 1113(~~a~~)(2) is applicable, plaintiff argues that he did not have actual knowledge of the breach until defendants violated Judge Peskoe's turnover Orders in late 1984. Plaintiff, therefore, concludes that the

filing of this action on May 1, 1985, fell well within the three-year Statute of Limitations.

Plaintiff finally argues that defendants concealed information about the Trust from him, and that, therefore, the six-year Statute of Limitation applies pursuant to the last clause in Section 1132(a)(2)(B).

In determining the applicable Statute of Limitations and the time at which the cause of action thereunder accrued, it is necessary to determine what causes of action are alleged by the plaintiff. That task is somewhat difficult here as plaintiff's Complaint is no model of drafting clarity. However, plaintiff's Complaint passes muster under the liberal spirit and letter of modern Federal procedure.

Federal Rule of Civil Procedure Page 8, which embodies the "notice" pleading requirements, requires only that the Complaint put the defendant on notice of the claims against him. See Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 790 (3d Cir. 1984), cert. denied, 105 S.Ct. 1179 (1985).

It is clear to me, however, from reading plaintiff's Complaint that it is based on failure to pay him his benefits under the Trust. Indeed, at Page 8 of plaintiff''s brief he states that his Complaint alleges breach of fiduciary duty based on failure to pay benefits.

Plaintiff's argument that a cause of action for failure to pay benefits is in the nature of a continuing violation which accrues every day that defendants

fail to pay is misplaced. ERISA law does not accept the doctrine of "continuing violation" which is sometimes applied to delay the accrual of causes of action under Title VII of the Civil Rights Act of 1964. See e.g., Delaware State College v. Ricks, 449 U.S. 250, 257 (1980).

To the contrary, a cause of action under ERISA for failure to pay benefits accrues when an application for benefits is denied. See Peris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc., 637 F.2d 357, 361 (5th Cir.) cert. denied, 454 U.S. 836 (1981); Reizherzer v. Shannon, 581 F.2d 1266, 1272 (7th Cir. 1978); Oates v. Teamster Affiliates Pension Plan, 482 F.Supp.. 481, 484 Footnote 7 (D.D.C. 1979); Baeten v. VanEss, 474 F.Supp. 1324, 1328 (E.D.

Wisc. 1979). See also Ballinger v. Perkins, 515 F.Supp.. 673, 676 (W.D. Va. 1981).

Buccino v. Continental Assurance Co., 578 F.Supp. 1518 (S.D.N.Y. 1983), relied on by plaintiff in support of a "continuing violation theory is inapposite. In Buccino, the breach alleged by plaintiffs was the fiduciaries' failure to divest itself of unlawful or imprudent investments. The Southern District found that the ERISA plan in that case was injured by the continued possession of improper investments and that the injuries occurred each time the Trust paid the premiums on each investment.

In contrast, in adjudicating claims of failure to pay ERISA benefits, the Courts have concluded that the injury

occurs, for Statute of Limitation purposes at one time, that is, when benefits claims are denied.

It is difficult to determine when plaintiff cause of action accrued here because the record doesn't indicate that Mr. Schlenger ever formally applied for benefits from the auxiliary fund nor does it indicate any formal rejection by the defendants of such a claim. To the contrary, Defendant Petricek, through her attorney in the divorce proceedings, Mr. Bernard Rudd, indicated during the divorce trail that plaintiff might be entitled to additional trust moneys:

"THE COURT: Are you claiming an interest in the pension fund?

"Mr. Schlenger: Yes, your Honor.

"THE COURT: Has anyone denied that you have an interest in the pension

fund, if it exists?

"MR. RUDD: There was an insurance policy, not a separate fund, that kind of fund, and Mr. Scnlenger, when he separated himself, or separated from the company, took this insurance policy. Whether there is another fund in existence or not, we, ourselves, don't know and, in fact, the government agent investigator is in court at Mr. Schlenger's behest on his subpoena. Maybe he can tell us. We would like to know that information one way or the other. If he's got any moneys coming to him, and they are in a fund someplace,. they are his." See trial transcript dated July 22, 1981 at Page 47 found at Exhibit F to the Certification of Nancy Lem, December 17, 1985.

Later during that same testimony,

there was another colloquy concerning the Trust:

"THE COURT: We don't know whether it (the Trust) was misappropriated or not, do we?

"MR. SCHLENGER: Mr. Becker made an examination --

"MR. RUDD: We made a representation that whatever accounts that Mr. Schlenger had are his."

See trial testimony of July 22, 1981 at Page 82, Exhibit F to Lem Certification.

The only indication in the record of any denial of benefits is found in the affidavit of Monica Petricek, dated January 1983, which was submitted in opposition to plaintiff's Motion before the Chancery Division of New Jersey Superior Court returnable January 28,

1983. See Exhibit I to Lem Certification.

At Paragraphs 3 and 4, Petrick states that on that date and since 1978, no assets remained in the Trust except the insurance policies. While this affidavit is not a formal denial of benefits, it certainly put plaintiff on notice that Defendant Petricek was repudiating any claim to benefits plaintiff was alleging. I, therefore, find that the Statute of Limitations began to run when plaintiff received this affidavit which was between January 14, 1983, the date of the cover letter to Judge Peskoe in which this affidavit was enclosed, and January 20, 1983, the date of plaintiff's response to the affidavit. See letter from Harold Schlenger to Judge Florence R. Peskoe,

January 20, 1983, at Exhibit I to Lem Certification.

Since the affidavit provided plaintiff with actual knowledge of the alleged breach, I find that the three-year Statue of Limitations of 29 U.S.C. Section 1113(a)(2)(A) applies. Since plaintiff filed this action before January 14, 1986, the end of the three-year period, this action is timely under ERISA.

Plaintiff's argument that the six-year limitations period applies is inapplicable because of fraud or consealment is inapplicable here. The concealment alleged by plaintiff, the failure to produce documents throughout court proceedings and the Department of Labor's investigation, goes not to whether plaintiff had a cause of action

but rather to the amount of benefits plaintiff was entitled to. Plaintiff may, therefore, not use this clause of Section 1113 to extend the limitations period.

Plaintiff's State law causes of action are likewise timely. N.J.S.A. 2A:14-1 (West 1952) provides a six-year Statue of Limitations for actions "for tortious injury to . . . personal property . . . or tortious injury to the rights of another . . . (or) for recovery upon a contractual claim or liability." This limitations period also runs from January of 1983. Therefore, plaintiff's claims are not barred.

I must also reject defendants' second argument for Summary Judgment that plaintiff is estopped from

asserting a claim because he was still a trustee when the alleged breach occurred. First, I find that plaintiff was not a co-fiduciary when the breach occurred. As stated previously, the breach complained of is the failure to pay benefits. This cause of action accrued in January 1983 when Defendant Petricek repudiated any possibility that plaintiff would be paid benefits from the auxiliary fund. It is clear that plaintiff was no longer a trustee in the fund at that time. Paragraph 15.1 of Article XV of the Trust Agreement entitled "provisions Relating to the Trustees" provides that each trustee shall serve "until he shall be removed by action of the Board of Directors of the Employer."

As stated previously, by resolution

dated April 9, 1978, Schlenger was discharged from any position in the company and was "no longer authorized to perform any act or function of any kind or nature whatsoever on behalf of the corporation." See Exhibit A to Lem Supplemental Certification.

As trustee of the Trust, Schlenger had provided services for or on behalf of the corporation. Therefore, I find that this resolution operated to divest Schlenger of his trustee duties for the Trust. That Schlenger never formally resigned is nondispositive.

Moreover, Defendant Petricek's conduct following this resolution is consistent with this interpretation. For example, defendant barred plaintiff from any access to the Trust documents. See certification of Harold

Schlenger, dated January 30, 1986.

Defendant Petricek also appears to be in violation of Orders of the Chancery Division of New Jersey Superior Court due to failure to turn over documents relating to administration of the Trust. See Exhibits P, Q and P to Lem Certification.

Even if plaintiff were still technically a trustee when the breach occurred, it is not at all clear to me that plaintiff would not have an action as a co-fiduciary. 29 U.S.C. Section 1132(a)(2) provides that a fiduciary may bring an action for appropriate relief under Section 1109, which governs actions for breach of fiduciary duty.

Section 1105, which provides for co-fiduciary liability for breach, does not impose liability under all

circumstances. For example, Section 1105(a)(1) provides for co-fiduciary liability only if the fiduciary knowingly participates in the act of another fiduciary with knowledge that such act constitutes a breach. 29 U.S.C. Section 1105(a)(1). Here, it is unlikely that defendants could prove that plaintiff participated in the alleged breach.

I turn, finally, to defendants' last argument, that plaintiff is not entitled to benefits from auxiliary fund of the Trust under the express terms of the Trust Agreement.

Defendants rely on Article IX, Paragraphs 9.1. and 9.2.

Paragraph 9.1 provides that terminated employees, other than those discharged for cause, shall have only

those rights or interest in the Trust provided by that Article.

Paragraphs 9.2 states: "Such participant shall have a fully vested interest as of the date of such termination of employment in each contract issued and in effect for his benefit and he shall receive by transfer from the trustees each contract issued and in effect for his benefit, including any dividend which may be apportioned to the contract on the date to which the premium has been paid by the trustees free and clear of this Trust. In no event shall such participant have any vested interest in the Auxiliary Fund. Any forfeitures arising from the operation of this plan shall be used to reduce the employer's contributions."

Defendants argue that since

plaintiff was terminated from his employment by the corporate resolution, discussed supra, as of April 9, 1978, that Paragraph 9.2 operates to deprive plaintiff of any further benefits under the Trust.

Plaintiff argues that under Article XI of the Trust Agreement, the Trust terminated after two successive years of nonpayment of the premiums of the insurance policies which comprise the Trust. Article XI, Paragraph 11.1(b) provides that: "Should there be a termination of the plan and Trust following a discontinuance of contributions, then the interests of all who are participants upon termination of the plan and Trust shall be fully vested as of the first date of nonpayment of premiums or date of written notice of

discontinuance by the employer, and the trustees shall proceed in accordance with the provisions of Section 11.2. "(Emphasis supplied.)

Plaintiff, therefore, argues, under this provision that benefits under the plan vested September 1, 1976, the first date of nonpayment of the premiums. Plaintiff contends that since he was still an employee of United on that date, the Article IX prohibition is thus inapplicable.

I cannot accept this interpretation. Article IX, Paragraph 9.2 contemplates that although a benefit may have already vested under the plan, it is forfeited upon the employee's termination. Indeed, the last sentence of that paragraph, which provides for the use of forfeited funds, supports

this interpretation.

Unless a provision of a plan governed by ERISA violates ERISA, it should be enforced according to its terms. However, Section 1053 of ERISA bars the forfeiture of certain vested rights under an "employee pension benefit plan" as defined in 29 U.S.C. Section 1002(2)(A).

The circumstances before me present a novel situation in that although the Trust is dominated as a "pension Trust," the benefits distributed when a plan is terminated are not really "retirement" benefits. They are benefits distributable due to liquidation of the fund. Section 11053 may bar the forfeiture of these benefits. I ask the parties to submit supplementary papers outlining their legal positions on this

question. I also ask plaintiff to address why Defendants Harmonique Farms Corp. and Campbell Investment Co. should not be dismissed from this action even assuming that plaintiff is entitled to Summary Judgment. Plaintiff's Complaint fails to allege facts indicating that either corporation is a fiduciary under ERISA, as provided by 29 U.S.C. Section 1002(21), or under common law. Moreover, plaintiff has not alleged that these corporations owed him any duty that would support liability for gross negligence.

In conclusion, therefore, I deny defendants' Motion for Summary Judgment based on Statute of Limitations and co-fiduciary grounds. I reserve on whether plaintiff is entitled to benefits under ERISA Section 1053 and on plaintiff's

Motion for Summary Judgment. The parties should submit their legal positions on the 1053 question by April 3rd. That's a Thursday.

The parties should return to this Court on Motion Day falling on April 28th, 1986, when I will render by decision.

I'll ask Counsel for defendant to draw an appropriate Order.

* * *

Appendix C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL 85-2091

HAROLD B. SCHLENGER,

Plaintiff,

-vs-

MONICA P. SCHLENGER,

et al,

Defendants.

OPINION

Newark, New Jersey

May 27, 1986

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN,

U.S.D.J.

Appearances:

DAVID DE BERRY, ESQ. and

ERIC SAVAGE, ESQ.

Attorneys for Plaintiff

HANNOCH WEISMAN, ESQS.

BY: IRVIN M. FREILICH, ESQ.

Attorneys for Defendants

THE COURT: This is an action by Harold B. Schlenger against Defendants Monica P. Petricek, United Wool Piece Dyeing and Finishing Co. (United), Campbell Investment Co., and Harmonique Farms Corp. under the Employee Retirement Income Security Act of 1974, 89 Stat. 829 (codified as amended at 29 U.S.C. Section 1001 et. seq. (ERISA) and State law claims of breach of fiduciary duty and gross negligence.

This matter was before me previously on March 24, 1987 on the parties' Cross-Motions for Summary Judgment. At that time I found that plaintiff's claims were not barred by the three-year Statute of Limitations imposed by 29 U.S.C. Section 1113 and the six-year Statute of Limitations governing the State law claims found at N.J.S.A.

2A:14-1 (West 1952) because plaintiff's cause of action accrued when he received notice through the affidavit of Monica Petricek dated January 1983, that benefits would be denied due to the absence of assets in the Trust auxiliary fund.

I also found that plaintiff was not estopped from seeking benefits because an act a co-fiduciary when he to pay benefits, accured. Defendant argued the question of whether Article IX, Paragraph 9.2 of the Trust agreement barred plaintiff's entitlement to any distribution of benefits from the auxiliary fund notwithstanding Section 1053 of ERISA, which provides that certain benefits are nonforfitable.

I asked the parties to brief the issue of Section 1053 application to

this case, which was raised by the Court sua sponte. Moreover, I asked the parties to address whether Campbell Investment co. and Harmonique Farms Corp. should be dismissed from this action, even assuming that plaintiff wins his Cross-Motion for Summary Judgment is granted because plaintiff fails to allege that these companies are fiduciaries under ERISA or common law, or because they owe no duty to plaintiff which would support a claim of gross negligence.

Before moving to Section 1053, I find it necessary to revisit my finding on March 24, 1986 that the cause of action accrued in this case in January of 1983. In making that finding I relied on the proposition that a cause of action for breach of fiduciary duty

based on failure to pay benefits does not accrue until benefits have been denied. See Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, 637 F.2d 357, 361 (5th Cir.), cert. denied, 454 U.S. 336 (1981) and cases cited in Bench Opinion of March 24, 1986.

However, in review of the file in this case shows that pursuant to a Complaint filed by Mr. Schlenger, the United States Department of Labor (DOL) investigated the Trust. Based on this investigation, the DOL concluded that the Trustees' failure to distribute assets of the auxiliary fund to the participants upon termination of the plan, violated 29 U.S.C. Section 1104(a)(1), which requires a fiduciary to discharge his duties in accordance

with the documents governing the plan. See Letter of Thomas B. Daly, Area Administrator of the Department of Labor, August 27, 1982.

This letter clearly put plaintiff on notice that the Trustee's conduct in failing to pay benefits from the auxiliary fund. While this letter is not a repudiation by Defendant Petricek of plaintiff's claim to benefits, it formally signaled to plaintiff that benefits had been denied. I, therefore, find that the cause of action accrued under 29 U.S.C. Section 1113 when plaintiff received this letter which was on or about August 27, 1982.

There is no indication on the record exactly when plaintiff received this letter. However, even assuming plaintiff received this letter the

earliest possible date, that is the day after the letter was written, August 28, 1982, plaintiff's action under EPISA is nonetheless timely.

Plaintiff's Complaint was filed May 1, 1985, and he amended his Complaint in July 25, 1985. This action was covered within the Statute of Limitations expired, which was at the earliest August 28, 1985. This finding has no effect on the timeliness of plaintiff's State law claims as I have previously held that the six-year Statute of Limitations of N.J.S.A. 2A:14-1 applies to those claims. This ruling also has no other effect on the Opinion I rendered March 24, 1986.

The facts of this case, drawing all reasonable inferences in favor of the plaintiff, were recounted in great

detail in my Opinion of March 24, 1986, and I will not repeat them here except to the extent necessary to resolve this issue.

Inferences were drawn in favor of plaintiff in accordance with the standard of Rule 56 because I was dealing with defendants' Motion for Summary Judgment on Statue of Limitations and estoppel grounds. I did not reach plaintiff's Cross-Motion for Summary Judgment.

If I was not clear in this regard in my Opinion of March 24, I wish to clarify any ambiguity now. the issue of nonforfitability is related to plaintiff's Cross-Motion for Summary Judgment and I will, therefore, decide them together.

To summarize the issue, defendants

argue that Article IX, Paragraph 9.2 of the Trust Agreement barred distribution of benefits from the auxiliary fund. Paragraph 9.2 states that a terminated employees shall have a fully vested interest as of "the date of such termination of employment in each Contract issued and in effect for his benefit and he shall receive by transfer from the Trustees each Contract issued and in effect for his benefit, including any dividend which may be apportioned to the Contract on the date to which the premium has been paid by the Trustees free and clear of this Trust. In no event shall such Participant have any vested interest in the Auxiliary Fund. Any forfeiture arising from the operation of this Plan shall be used to reduce the Employer's contributions."

(Emphasis supplied.)

Defendants contend that since plaintiff was terminated from his employment by the corporate resolution of April 9, 1976 and that Paragraph 9.2 operates to deprive plaintiff of any further benefits under the Trust. Plaintiff argues that his rights to the auxiliary fund vested when the Trust terminated according to its own terms under Article XI, Paragraph 11.1(b) of the Trust Agreement which states in pertinent part: "Should there be a termination of the Plan and Trust following a discontinuance of contributions, then the interests of all who are Participants upon termination of the Plan and Trust shall be fully vested as of the first date of nonpayment of premiums or date of

written notice of discontinuance by the Employer, and the Trustees shall proceed in accordance with the provisions of Section 11.2." (Emphasis supplied.)

Section 11.2 further provides that: "Upon termination, the Trustees shall transfer to each participant, by suitable instrument of transfer and delivery thereof, all Contracts for his benefit then in the Trustees' possession, and thereafter, the Trustees shall have no further right, title or interest in and to such Contracts. Any funds or other assets held by the Trustees or subsequently reverting to such Trustees from the Auxillary Fund, shall, after deducting estimated expenses for distribution thereof, be distributed among the Participants in proportion to the actuarial reserved

(sic) for each Participant as described in Section 7.2(c)."

Based on this language, it appears that the Trust Agreement provides that the participants do have a vested right in the auxiliary fund in the event of termination of the plan. However, there is no question that the last sentence of Paragraph 9.2 quoted supra contemplates even the forfeiture of vested benefits. The question posed by this Court on March 24, therefore, was whether Paragraph 9.2 of the Trust Agreement violates ERISA Section 1053.

Section 1053 of ERISA requires, in somewhat complicated terms, that pension plans provide minimum nonforfitable accrued benefits to plan participants upon the attainment of normal retirement age and upon completion of certain

numbers of years of service.

The statutory definition of "accrued" found in Section 1002(23) and the legislative history of this statutory subsection, however, precludes the application of Section 1053 to the benefits here at issue. This subsection provides in pertinent part: "(23) The term 'accrued benefit' means -- (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age . . ." 29 U.S.C. Section 1002 (23) "normal retirement age" as defined in 29 U.S.C. 1002(24), is that specified in the plan or the later date of attaining age 65 or 10 years' participation in the

plan. Thus, Section 1053's reference to accrued benefits refers to normal rather than early retirement benefits or other ancillary benefits not at all related to retirement. See Bencivanga v. Western Pennsylvania Teamsters and Employers Pension Fund, 763 F.2d 574, 577 (3d Cir. 1985); Polke v. Schaffer, 616 F. Supp. 1322, 1327-23 (D.Del. 1985).

In Bencivanga, the Third Circuit was faced with the question of whether early retirement benefits could be reduced by Trustees of the fund during the period between the date of early retirement and the time benefits would become payable under the plan to an amount equal to the actuarial equivalent of normal retirement benefits. Although the Court was concerned with the benefit accrual requirements of Section 1054 of ERISA,

the same definition of "accrued benefit" is applicable in the context of Section 1053.

In finding that "accrued benefit" referred only to normal retirement benefits, the Third Circuit relied on the legislative history found in the report of the House of Representatives on their version of the bill. The Third ‡circuit relied Particularly on the following passage: "The term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits . . . . To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income . . . . Also, the accrued benefit to which the vesting

rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age . . . . Generally, an individual's 'accrued benefit' under a defined benefit plan is to be expressed in the form of an annual benefit commencing at normal retirement age." H. R. Rep. No. 807, 93d Cong., 2d Sess. 57, reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4670, 4726.

This Court finds additional support for this interpretation in the House Conference Report: "Accrued benefit. Under the conference substitute, the term 'accrued benefit' refers to pension or retirement benefits. The term does not apply to ancillary benefits, such as payment of medical expenses (or insurance premiums for each expenses),

or disability benefits which do not exceed the normal retirement benefit payable at age 65 to an employee with comparable service under the plan, or to life insurance benefits payable as a lump sum.

"Also, the accrued benefit does not include the value of the right to receive early retirement benefits, or the value of social security supplements or other benefits under the plan which are not continued for any employee after he has attained normal retirement age. However, an accrued benefit may not be reduced on account of increasing age or service (except to the extent of social security supplements or their equivalents). . . .

"In the case of a defined benefit plan, the accrued benefit is to be

determined under the plan, subject to certain requirements. In general, the accrued benefit is to be defined in terms of the benefit payable at normal retirement age. Normal retirement age generally is to be age specified under the plan. However, it may not be later than period of the time anniversary the participant commenced participation, whichever last occurs." H. R. Rep. No. 1280, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News, 4639, 5038, 5054-55.

It is clear that the benefits here at issue, the distribution of assets in the auxiliary fund in the event of early termination of the plan, are not related to normal retirement benefits. Rather, they are ancillary benefits somewhat analogous to the medical expense or

disability benefits referred to in the legislative history. Thus they are not accrued benefits that are nonforfitable under Section 1053 of ERISA.

In his submission to the Court, the plaintiff also relies on Section 411(d)(3) of the Internal Revenue Code, which was enacted as part of ERISA, in arguing that these early termination benefits are nonforfitable. Section 411(d)(3) provides that a trust shall not be a qualified trust under 26 U.S.C. 401(a) unless its plan provides that upon termination or partial termination of the plan, "the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees'

accounts, are nonforfitable."

To determine whether this subsection protects the benefits provided in the event of early termination of the Trust, we must look to the definition of accrued benefit applicable to this section found in Section 411(a)(7)(A): "For the purposes of this section, the term 'accrued benefit' means -- (i) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age . . . ."

Subsection (c)(3) referred to in the subsection merely provides for an actuarial adjustment to the payment of the benefit. Obviously this definition is rather circular and adds little to

our understanding of the definition of "accrued benefits."

However, Treasury regulations promulgated pursuant to Section 411 illuminate its meaning. Section 1.411(a)-7(a)(1)(i) of Title 26 of the Code of Federal Regulations provides: "In general, the term 'accrued benefits' refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses . . ."

As noted in Bencivanga, this regulation conforms to the legislative history of the Act. 763 F.2d at 579. Clearly, this regulation provides that the benefits such as the ones in question here are not "accrued benefits"

under the act. Therefore, I find neither Section 1053 or 26 U.S.C. Section 411 prevents these benefits from forfeiting under the terms of the Trust found in Paragraph 9.2.

Since this matter has been resolved and I have disposed of defendants' arguments for Summary Judgment, I turn now to the plaintiff's argument for Summary Judgment asserted in is original brief submitted in support of his Cross-Motion for Summary Judgment.

Plaintiff argues that he is entitled to the benefits as a matter of law and fact because they undeniably vested once the plan terminated, and that such benefits are not divested because of termination of employment. In plaintiff's own words, "This is the very meaning of the 'vesting' of a benefit."

However, the Third Circuit in Bencivanga held to the contrary. The Court stated: "Whether rights have 'vested' depends on whether they are 'accrued benefits.' This is because under ERISA only accrued benefits vest. 29 U.S.C. Section 1053(a)."

Therefore, unless plaintiff can cite another provision of ERISA which saves his claims, I can find no provision of ERISA which Paragraph 9.2 of the Trust Agreement violates. In the absence of a statutory prohibition, the terms of the Trust Agreement govern plaintiff's rights. I, therefore, find as a matter of law that plaintiff's ERISA claims must fall and that defendants are entitled to Summary Judgment on Counts 1, 2, 4, 5 and 8, which state causes of action under ERISA.

Count 3 of plaintiff's Amended Complaint, which purports to seek enforcement of the Order of the Superior Court of New Jersey, Chancery Division, Matrimonial Part, must likewise fail. However, as a matter of State equitable distribution law, State Courts may only award those benefits that defendant is entitled to under the terms of the Trust Agreement or under Federal law governing pension plan.

As I have denied plaintiff's ERISA claims and have found that plaintiff is not entitled to relief under the terms of the Trust, I find no basis for enforcing the State Court Order previously entered.

Defendants are also entitled to Summary Judgment on plaintiff's State law claims of breach of fiduciary duty

and gross negligence alleged in Counts 6 and 7 of the Complaint. The predicate of these claims is that plaintiff is entitled to benefits and that defendants breached or were grossly negligent in the discharge of their duties to distribute these benefits. However, as I have determined that plaintiff was not entitled to these benefits these claims are without merit.

Since I have found that defendants are entitled to Summary Judgment because the terms of the Trust legally provided that the benefits were divested upon the termination of the plaintiff from United Wool, I need not reach defendants' arguments raised in their supplemental submissions to this Court. The other issue raised sua sponte by this Court at the parties' last appearance, i.e.,

whether Campbell and Harmonique should be dismissed, is moot in light of today's ruling.

* * *

Appendix D

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 85-2091

HAROLD B. SCHLENGER,

Plaintiff,

v.

MONICA PETRIC, et al.,

Defendants.

THE HON. HAROLD A. ACKERMAN

ORDER

This matter having come before the Court on March 24, 1986 on the parties' cross-motions for summary judgment and the Court having reviewed the papers and pleadings on file in this matter and having heard argument of counsel and it appearing that plaintiff's claims of breach of fiduciary duties relate solely to defendants' alleged failure to pay plaintiff benefits from the auxiliary fund and for good cause shown:

IT IS on this 15th day of April, 1986

ORDERED that :

(1) this Court's oral decision read on the record on March 24, 1986 shall constitute its findings of facts and conclusions of law;

(2) defendants' motion for summary judgment dismissing plaintiff's claims for benefits from the auxiliary fund on statute of limitations grounds be and the same hereby is denied;

(3) defendants' motion for summary judgment claiming that plaintiff's claims for benefits from the auxiliary fund are barred because of his status as a co-fiduciary be and hereby is denied:

(4) the Court requests further supplemental briefs on the issue of whether or not plaintiff's alleged interests in the auxiliary fund are non-forfeitable under 29 U.S.C. Section

1053, which briefs shall be filed by April 3, 1986; and

(5) this matter shall be set down for oral argument on April 28, 1986.

HAROLD A. ACKERMAN, U.S.D.C.J.

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 85-2091

HAROLD B. SCHLENGER,

Plaintiff,

v.

MONICA PETRIC, et al.,

Defendants.

THE HON. HAROLD A. ACKERMAN

ORDER

This matter having come before the Court on May 27, 1986 on the adjourned return date of the parties' cross-motions for summary judgment and the Court having previously entered an order on April 15, 1986 (a copy of which is annexed hereto) and having requested further supplemental briefs and the

Court having reviewed the papers and pleadings on file in this matter and having heard argument of counsel and for good cause shown,

IT IS on this 12th day of June, 1986

ORDERED AND ADJUDGED that

(1) This Court's decisions of March 24, 1986, as supplemented and modified on May 27, 1986, shall constitute its findings of fact and conclusions of law;

(2) Defendants' motion for summary judgment be and hereby is granted; and

(3) Final judgment be and hereby is entered with prejudice dismissing plaintiff's Amended Complaint in its entirety.

HAROLD A. ACKERMAN, U.S.D.C.J.

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 85-2091

HAROLD B. SCHLENGER,

Plaintiff,

v.

MONICA PETRICEK, UNITED WOOL PIECE DYING AND FINISHING CO., et al.

Defendants.

ORDER

For the reasons set forth in this court's opinion filed this date;

It is on this 5th day of December, 1986;

ORDERED that plaintiff's motion for reconsideration is hereby denied.

HAROLD A. ACKERMAN, U.S.D.C.J.

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 85-2091

HAROLD B. SCHLENGER,

Plaintiff,

v.

MONICA PETRICEK, UNITED WOOL PIECE DYEING AND FINISHING CO., UNITED WOOL PIECE DYEING AND FINISHING CO. PENSION TRUST, CAMPBELL INVESTMENT CO., HARMONIQUE FARMS CORP,

Defendants.

OPINION

ACKERMAN, District Judge

Plaintiff Harold Schlenger has brought this action against the above named defendants, alleging violations of the Employee Retirement Income Security Act of 1974, 88 Stat. 829 (codified as

amended at 29 U.S.C. Section 1001 et seq.) "ERISA'.

The parties were before this court on motions of summary judgment under rule 56 of the Federal Rules of Civil Procedure and defendant's motion was granted by a decision rendered May 27, 1986. An analysis of the terms of the United Wool Piece Dyeing and Finishing Co. pension trust showed that plaintiff was entitled to no more than he had already received in prior disbursements and that furthermore defendants' management of the trust did not violate any provision of ERISA. I held that monies in the auxiliary fund of the plan were not vested benefits to the plaintiff and thus they were forfeitable. In that opinion, I relied upon Bencivenga v. Western Pennsylvania

Teamsters and Employers Pension Fund, 763 F.2d 574, 577 (3rd Cir. 1985), which neither party had argued in their briefs. Now plaintiff seeks reconsideration of my decision pursuant to Fed.R.Civ.P. 52(b) and local rule 12I of this court. For reasons stated below, I am denying plaintiff's motion for reconsideration.

Rule 52(b) on which plaintiff relies in making a motion for reconsideration is inapposite here. The rule is intended to apply to cases tried without a jury and it is well settled law that it is inapplicable to summary judgment motions under Fed. R.Civ.P. 56. See Stewart v. United States, 716 F.2d 755 (10th. Cir. 1982), cert. denied, 105 S.Ct. 432, (1982). 9 C. Wright & A. Miller, Federal Practice and

Procedure: §2575. Thus rule 52(b) is of no relevance to the reconsideration motion presently before me.

I now turn to plaintiff's motion under local rule 12I of the general rules of this court. The rule's language and objectives are explicit: reconsideration is granted only when counsel has presented new factual matters or controlling decisions which the court has overlooked. I have read plaintiff's submissions at length and I find that he has presented neither.

It is undisputed that no new facts have come to light since the May 27, 1986, ruling and plaintiff's sole basis for reconsideration is his claim that the court misread the significance of ERISA and that the decision serves to undermine its import. More

specifically, plaintiff contends that its import. More specifically, plaintiff contends that Bencivenga is clearly distinguishable from the matters at hand. I can see that plaintiff disagrees with the court's view of the applicable law, but I have yet to hear what law or cases were overlooked. Bencivenga deals with early retirement benefits and, arguendo, this case does not involve early retirement per se. Yet here, the benefits sought by plaintiff are attributable to the early termination of the pension plan and not to retirement, giving them the clear label of ancillary benefits. I chose to rely on Bencivenga because it reflects this circuit's view that benefits ancillary to retirement are not "vested" within the meaning of ERISA and are thus

forfeitable.

In support for his motion for reconsideration, plaintiff has also set forth all the arguments originally presented prior to my May 27, 1986, decision. These contentions have already been dealt with and need not be addressed again. Accordingly, plaintiff's motion for reconsideration is denied.

Appendix H

SUPREME COURT OF THE UNITED STATES

No. A-254

HAROLD B. SCHLENGER,

Applicant,

v.

MONICA P. SCHLENGER, AKA
MONICA PETRICEK, ETC., ET AL.

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 27, 1987.

/s/ William J. Brennan, Jr.

Associate Justice of the

Supreme Court of the

United States

Dated this 28th

day of September, 1987.

Appendix I

AMENDMENT V-GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix J

RULE 56. Summary Judgment

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Appendix K

ARTICLE XI

TERMINATION OF PLAN AND TRUST

11.1 This Plan and Trust shall terminate upon the happening of either of the following events:

(a) Discontinuance by the Employer upon written notice executed by the Employer and delivered to the Trustees.

(b) Nonpayment for two (2) successive years of the premiums on all policies and contracts held by the Trustees. Should there be

a termination of the Plan and Trust following a discontinuance of contributions, then the interests of all who are Participants upon termination of the Plan and Trust shall be fully vested as of the first date of nonpayment of premiums or date of written notice of discontinuance by the Employer, and the Trustees shall proceed in accordance with the provisions of Section 11.2.

11.2 Upon such termination, the Trustees shall transfer to each

Participant, by suitable instrument of transfer and delivery thereof, all Contracts for his benefit then in the 'Trustees' possession, and thereafter the Trustees shall have no further right, title or interest in and to such Contracts. Any funds or other assets held by the Trustees or subsequently reverting to such Trustees from the Auxiliary Fund, shall, after deducting estimated expenses for distribution thereof, be distributed among the Participants in proportion to the actuarial reserved for each Participant as described in Section 7.2(c).

Appendix L

MINUTES OF JOINT SPECIAL MEETING
OF DIRECTORS AND STOCKHOLDERS
OF
UNITED WOOL PIECE DYEING & FINISHING
CO., a New Jersey Corporation

The Joint Special Meeting of Directors and Stockholders of the Corporation, held at its principal office located at 1 Canal Street, Passaic, New Jersey, on April 9, 1978, at 10:00 A.M. with all the Stockholders and Directors being present.

The President rendered a general report of the business of the corporation, and upon motion duly made and seconded, the following Resolution was unanimously approved:

"RESOLVED that the corporation

discharge HAROLD SCHLENGER, as an officer, director, agent, servant, and/or employee of the corporation and that HAROLD SCHLENGER is no longer authorized to perform any act or function of any kind or nature whatsoever on behalf of the corporation."

There being no further business to come before this special meeting, same was duly adjourned.

HARRY PETRICEK

HARRY PETRICEK, Asst. Secretary

I HEREBY CERTIFY that all Directors and Stockholders of the Corporation were present at the foregoing meeting and that none protested the absence of

Notice of the Meeting.

HARRY PETRICEK

HARRY PETRICEK, Asst. Secretary

Appendix M

POINT III

THE PARTIES HAVE ESTABLISHED THE EXISTENCE A MATERIAL ISSUE OF FACT WITH REGARD TO MR. SCHLENGER'S ALLEGED TERMINATION.

The papers submitted to the court below establish clearly drawn factual dispute on whether Mr. Schlenger was terminated, or properly terminated, from his position at United Wool Piece Dyeing and Finishing Co. Mr. Schlenger has certified that he did not attend the meetings of the officers and directors to this case. Defendants have claimed the opposite. The issue is, of course, critical, for if Mr. Schlenger was not terminated, defendants cannot claim that his pension rights did not vest on September 1, 1976. Plaintiff's ability to prove this fact, let alone to take

discovery on the issue, was precluded by the lower court's decision which simply resolved the factual dispute on the papers, apparently by weighing the credibility of the conflicting evidence. Such a ruling on a summary judgment motion is inappropriate and should be reversed.

Appendix N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2091

HAROLD B. SCHLENGER,

Plaintiff,

v.

MONICA PETRICEK, Individually and as Trustee of the United Wool Piece Dyeing and Finishing Co. Pension Trust, UNITED WOOL PIECE DYEING AND FINISHING CO. PENSION TRUST, and UNITED WOOL PIECE DYEING AND FINISHING CO., CAMPBELL INVESTMENT CO. and HAMONIQUE FARMS CORPORATION,

Defendants.

THE HON. HAROLD A. ACKERMAN

SUPPLEMENTAL CERTIFICATION IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NANCY LEM, of full age, certifies and says:

1. I am an attorney at law of the State of New Jersey and associated with the firm of Hannoch Weisman, attorneys for the defendants in the above captioned matter. I am familiar with the facts in this case.

2. On November 1, 1985, I wrote to the Department of Labor requesting a copy of their file regarding their investigation of the United Wool Piece Dyeing and Finishing co. Pension Trust. On or about January 15, 1986 I received from the Department of Labor a copy of their file which included the following:

Exhibit A: Minutes of Joint Special Meeting of Directors and Stockholders of United Wool Piece Dyeing & Finishing co. for April

9, 1978.

3. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Nancy Lem

Nancy Lem

Dated: February 26, 1986

Appendix O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2091

Plaintiff,

HAROLD B. SCHLENGER,

vs

Defendants.

MONICA PETRICEK, et al.,

CERTIFICATION OF
HAROLD B. SCHLENGER

Harold B. Schlenger, certifies and says:

1. I am the Plaintiff in this matter. I am fully familiar with this matter.

2. Defendants have certified, in

connection with these cross-motions for summary judgment, that all officers and directors were present at certain meetings of officers and directors. This statement is not true, in that I was not present at said meetings at those times.

I certify that the above statements made by me are true. I am aware that if any of the above statements made by me are willfully false, I am subject to punishment.

Harold B. Schlenger

HAROLD B. SCHLENGER

DATE: MARCH 13, 1986

5. Finally, it is respectfully submitted that the decision of this Court is premised on the erroneous conclusion that Mr. Schlenger was discharged from his employment in April 1978. His March 13, 1986 certification (Exhibit "B") denies defendants' claim that he was legally discharged or that he was present at the board of directors' meetings where his ouster was discussed. In the hearing held on August 4, 1981 in the divorce proceedings (a portion of the transcript of which is annexed as Exhibit "C"), Judge Yaccarino ruled that "Nobody disputes" plaintiff's contention that he was not present when he was allegedly fired (p.98) and held, "There was a lot of non-observance of the law" in

defendants' governance of the United Wool Piece Dyeing & Finishing co. Plaintiff's certification and Judge Yaccarino's rulings warrant an amendment of the Court's finding regarding the legality and/or the date of Plaintiff's alleged termination or, at the very least, granting Plaintiff discovery on this issue.

WHEREFORE, I respectfully request that this Court reconsider its Order entered on June 12, 1980 and grant Plaintiff summary judgment on the issue of liability, together with costs and fees and such other and further relief as this Court deems just and proper.

i certify that the above statements made by me are true. I am aware that if any of the above statements made by me are willfully false, I am subject to

punishment.

E. A. Savage

Eric A. Savage

Dated: August 5, 1986

Appendix Q

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2091-A

Plaintiff,

HAROLD B. SCHLENGER,

v.

Defendants.

MONICA SCHLENGER, A.K.A. MONICA PETRICEK, et al.,

NOTICE OF MOTION

To: Nancy Lem, Esquire
Hannoch Weisman
4 Becker Farm Road
Roseland, NJ 07068

PLEASE TAKE NOTICE that on Monday, December ;(, 1985, at 10:00 a.m. or as soon thereafter as counsel may be heard, the undersigned attorneys for

Plaintiff will move for an order compelling the deposition of Defendant, Monica Petricek, in this matter. In support of this application, Plaintiff will rely upon the annexed Affidavits of David B. Avigdor and Harold Schlenger in this matter.

No brief is required with this motion, because this motion merely seeks to enforce discovery rights to which Plaintiff is entitled under the Rules.

LAMPF, LIPKIND, PRUPIS & PETIGROW
A Professional Corporation
Attorneys for Plaintiff

By: David B. Avigdor
DAVID B. AVIGDOR

Date: November 14, 1985